Supreme Court, U.S.
FILED
OCT 17 2009
OFFICE OF THE CLERK

No. 08-1511

IN THE SUPREME COURT OF THE UNITED STATES

WENDELL F. GILLEY, an individual
and as class representative,
Petitioner(s)

v.

MONSANTO COMPANY, INC. et al.
Respondent(s)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR REHEARING

Elisa Smith Rives
Of Counsel
P. O. Box 920
Guntersville, AL 35976
(256) 582-3559

Mark D. DeBofsky
Counsel of Record
DALEY, DEBOFSKY & BRYANT
55 W. MONROE ST., STE 2440
CHICAGO, ILLINOIS 60603
(312) 372-5200 x 4800
FAX (312) 372-2778

Counsel for Petitioner(s) Wendell F. Gilley

OCTOBER 16, 2009

QUESTION PRESENTED ON WRIT OF CERTIORARI

1. Whether after *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. __, 128 S.Ct. 2343 (2008) a non-reversionary trust vitiates the need for consideration of an ERISA plan's conflict of interest as a factor?

RULE 14.1(b) STATEMENT

Respondents: "New" Monsanto Company, Inc., Monsanto Company Salaried Employees' Pension Plan, Monsanto Company Employee Benefits Plan Committee, Monsanto Company Employee Benefits Executive Committee, and Pharmacia Corporation.

Petitioner: Wendell F. Gilley, an individual.

RULE 29.6 STATEMENT

New Monsanto Company, Inc., a successor entity of "Old" Monsanto Company, Inc.

Pharmacia Corporation, a successor entity of "Old" Monsanto Company, Inc., a subsidiary of Pfizer, Inc.

Solutia Inc., a successor entity of "Old" Monsanto Company, Inc.[1]

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[1]Pharmacia f/k/a "Old" Monsanto Company, Inc. is the original obligor for pensions belonging to former workers who separated with a deferred vested accrued benefit, a pension. Solutia as assignee filed for bankruptcy protection in the Southern District of New York prior to the initiation of the instant litigation. *In re: Solutia Inc. et al.* Case No. 03-17949 (PCB). Solutia's interests in the instant proceedings were represented by counsel for Respondents who filed proof of claims in Solutia's bankruptcy proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES

WENDELL F. GILLEY, an individual
and as class representative,
Petitioner(s)

v.

MONSANTO COMPANY, INC. et al.
Respondent(s)

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR REHEARING

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. CONST. amend I.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST. amend V.

FEDERAL STATUTE

As part of a comprehensive enforcement scheme the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1000 et seq., permits:

> (a) A civil action [to be] be brought – (2) . . . by a participant . . . for appropriate relief under section 409; (3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this title . . . or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the plan. 29 U.S.C. §§ 1132(a)(2) & (3).

STATEMENT

After due consideration, counsels for Petitioner, Wendell F. Gilley, as an individual and class representative for former workers of "Old" Monsanto Company, Inc., believe that a Petition for Rehearing is appropriate in this case. Petitioner presents his Petition in good faith and not for any purpose of delay. There can be no prejudice to Respondents as the underlying relief sought by Petitioner is for equitable relief. Petitioner hereby prays for reconsideration of the denial on October 5, 2009, of his Writ of Certiorari.

FACTS AND PRIOR PROCEEDINGS

Petitioner, Wendell F. Gilley, hereby incorporates by reference the statement of facts and prior proceedings set forth in his Petition for Writ of Certiorari No. 07-0643 filed November 8, 2007, and his Petition for Writ of Certiorari No. 08-1511 filed June 2, 2009, and denied on October 5, 2009.

Petitioner, individually and on behalf of a class, sought equitable relief under 29 U.S.C. § 1132(a)(2) and (3) in the Northern District of Alabama Middle Division, Case No. 04-CV-0562 for breach of fiduciary duty

Respondents refusing discovery and resisting certification, primarily on numerosity grounds, recast the class action as an individual discretionary claim for benefits under 29 U.S.C. § 1132(a)(1)(B). Based on a finding of a conflict of interest the District Court awarded Petitioner his accrued benefit as equitable relief applying a heightened standard of review. Appendix A & B. On June 28, 2007, the United States Court of Appeals for the Eleventh Circuit issued a precedential decision reversing the District Court's award of Petitioner's accrued benefit as equitable relief under 29 U.S.C. § 1132(a)(3) finding the relief requested was legal relief only available under 29 U.S.C. § 1132(a)(1)(B).[1] A copy of the published precedential opinion is attached at Appendix C. Petitioner filed a Petition for Writ of Certiorari in this Court for review of the interlocutory decision, Case No. 07-0643, that was denied on January 14, 2008. As this Court has said many times "[s]uch an order is plainly not a "judgment or decision . . . on the merits." *Boumediene v. Bush*, 550 U.S. ____ (2007).

On remanded to the District Court Petitioner's remaining claims for equitable relief were dismissed *sua sponte* for lack of subject matter jurisdiction based on the law of the case doctrine. Appendix D. Petitioner appealed and the Eleventh Circuit affirmed finding the law of the case

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[1]Because Respondents stipulated that Petitioner was vested under "Old" Monsanto's defined benefit plan the only issue on interlocutory appeal was whether a former employee was entitled to bring a claim for benefits as equitable relief if he did not receive all he was entitled to receive as a result of a breach of fiduciary duty.

established in *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007) controlled, and there were no meritorious exceptions. A copy of the Eleventh Circuit's unpublished decision is attached at Appendix E. A Petition for *En Banc* review was denied on April 6, 2009. Appendix F. A motion of Appellant, Wendell F. Gilley, for stay of the issuance of the mandate pending Petition for Writ of Certiorari was denied April 28, 2009. Appendix G. This Court denied Petitioner's second Petition for Writ of Certiorari on October 5, 2009.

INTERVENING CIRCUMSTANCES

In the instant action, a divided panel of the Eleventh Circuit in a precedential decision declared Petitioner was not entitled to benefits as equitable relief to redress a breach of fiduciary duty. *Gilley v. Monsanto Company, Inc., 490 F.3d 848* (11th Cir. 2007); *Gilley v. Monsanto Company, Inc.*, 309 Fed. Appx. 362 (11th Cir. 2009). Respondents utilizing the uniform common law doctrine and this case as precedent seek in a case below *Heptinstall v. Monsanto Company, Inc.* 09-12665-DD to deny equitable relief to all former workers of "Old" Monsanto who separated with a right to an accrued vested pension benefit. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987).

Since the filing of Petitioner's Writ of Certiorari a circuit split has arisen on the issue of allowing equitable relief for breach of fiduciary duty to plaintiffs who seek whatever would have been their benefits had the plan

honored employee's entitlement. *See* Republished opinion in *Poore v. Simpson Paper Co.*, 2009 U.S. App. LEXIS 11170 (9th Cir. May 21, 2009) (former employer was not entitled to summary judgment because it breached its fiduciary duty to beneficiaries who were participants under ERISA with standing to bring claims for equitable relief even though they were not seeking vested benefits); *Vaughn v. Bay Envir. Mgt., Inc.*, 567 F.3d 1021 (9th Cir. June 4, 2009) (dismissal for lack of subject matter was improper because former employees had standing as participants to recover losses occasioned by breach of fiduciary duty even though they received full disbursement of their individual account under defined contribution plan); *Harris v. Amgen, Inc. et al.*, 573 F.3d 728 (9th Cir. July 14, 2009)(complaint should not have been dismissed for lack of standing because former employee who received less than full entitlement in benefits as a result of a breach of fiduciary duty had claim under 29 U.S.C. § 502(a)(2)); *In re: Unisys Corp. Retiree Med. Benefits ERISA Litig. v. Unisys Corp.* 2009 U.S. App. LEXIS 19769 (3rd Cir. September 2, 2009)(former employees claim under 29 U.S.C. § 1132(a)(3) for promised retirement medical benefits encompassed a claim for breach of fiduciary duty, a violation of ERISA, entitling them benefits when employer failed to advise employees the plan could be terminated or amended and statute of limitations for breach of fiduciary duty was only applicable in cases of voluntary termination). Although other circuits have recognized the right of former employees to bring claims for equitable relief for breach of fiduciary

duty to recover their full entitlement to benefits denied by biased decision-makers, the Eleventh Circuit Court of Appeals has remained steadfast in its view that Petitioner was not entitled to benefits as equitable relief for a breach of fiduciary duty.

OTHER SUBSTANTIAL GROUNDS

Petitioner candidly recognizes that the grant of a Petition for Rehearing is relief rarely granted. However, Justice Scalia in dissent in *Metropolitan Life Insurance Company, Inc. v. Glenn* "MetLife" suggested the majority should not have addressed the holding of *MetLife* to the employer/administrator setting because that case was not before the Court. *Metropolitan Life Insur. Co., Inc. v. Glenn*, 554 U.S. ___, 128 S.Ct. 2343 (2008). Petitioner respectfully suggests that the case Justice Scalia has been waiting for to address a conflict of interest in the employer/administrator setting is the instant case. The only other case we are aware of is the collateral case pending in the Eleventh Circuit Court of Appeals below filed by Petitioner's primary counsel on behalf of seven additional former workers of "Old" Monsanto who are similarly situated to Petitioner. *See Heptinstall et al. v. Monsanto Company, Inc. et al.* Appeal No. 9-12665-DD.

"Old" Monsanto and its defined benefit plan no longer exist. Pharmacia, new Monsanto Company, Inc., and Solutia Inc. as successor entities of "Old" Monsanto each established defined contribution plans funded from assets formerly held in "Old" Monsanto's collective trust. A

"defined contribution plan" is "a pension plan which provides for an individual account for each participant for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any *forfeiture* of accounts of other participants which may be allocated to such participant's account. ERISA Section 3(34)." *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 675 n.2 (6th Cir. 2008) citing 29 U.S.C. § 1002. Because "Old" Monsanto under its defined benefit plan never reported separated workers with an entitlement to a deferred vested accrued benefit successor entities never established individual accounts under successor plans for these "working class" participants. *Varity Corporation v. Howe*, 516 U.S. 489 (1996); *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). Successor entities of "Old" Monsanto, Pharmacia, new Monsanto Company, Inc., and Solutia, denied benefits to Petitioner as part of a *Varity* scheme to establish precedent to "take" former workers' separated vested pension benefits. In the case pending in the Eleventh Circuit, *Heptinstall v. Monsanto Company, Inc.* No. 9-12665-DD, Pharmacia, new Monsanto Company, Inc., and Solutia, Inc. cite the instant case as precedent for the denial of equitable relief to "everyone" as a matter of *stare decisis*. Counsel states "the 'Eleventh Circuit's recent holdings in *Gilley* [*v. Monsanto Co.*, 490 F.3d 848 (11th Cir. 2007) and 309 Fed. Appx. 362 (11th Cir. 2009)] provide clear, *stare decisis* guidance for the disposition of plaintiffs' claims" and that case *Gilley* and this case 'arise from substantially identical facts, were

brought by the same attorney for plaintiffs, advance ERISA claims, and involve many of the same defendants." Appellees' Brief in *Heptinstall v. Monsanto Company, Inc. et al.* 09-12665-DD at p. 2.[2]

If a decision made by a conflicted trustee utilizing his facts and law under an arbitrary or capricious standard establishes precedent for the denial of "vested" benefits for all former workers promised a pension then ERISA is a nullity. If *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007), a case reviewed under the arbitrary standard, is precedent for denying equitable relief for breach of fiduciary duty to all former workers of "Old" Monsanto denied a vested pension benefit then ERISA offends the Constitution by denying substantive due process and the right to redress in regards to persons never before the court. *Caperton et al. v. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S. Ct. 2252 (2009)(holding "it is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process"); *Eastern Enterprises v. Apfel Commissioner of Social Security, et al.*, 524 U.S. 498 (1998)(holding a regulatory act by Congress that permits the "taking" of property belonging to A for the benefit of B is unconstitutional under the Fifth Amendment "taking" clause as applied). *Id.*

In the instant case the plan administrator for new Monsanto Company, Inc., a successor entity of "Old" Monsanto and hardly a fair

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[2]The only decision in Petitioner's favor during six years of litigation was the decision by the District Court to award Petitioner his accrued benefit based on a conflict of interest. Appendix A to C.

tribunal, denied benefits to Petitioner in the interest of establishing precedent for the denial of vested benefits to all former workers. If Respondents are successful in their *Varity* scheme to denied all vested benefits of former workers, then a regulatory act by Congress, ERISA, has permitted the "taking" of property belonging to one group of citizens, the "working class", for the benefit of another, corporate executives. *Id.* Unless this Court recognizes the appropriateness of equitable relief to redress a breach of fiduciary duty "Old" Monsanto's former workers who separated with a vested accrued benefit will have their pensions forfeited inuring to the benefit of former executives who acted as trustees. In the interest of justice we believe the case merits the fullest possible attention at this juncture to clarify the rights of former employees to equitable relief for breach of fiduciary duty and to resolve the debate over a conflict of interest as a factor to be considered by reviewing courts in the employer/administrator setting.

In the debate in Congress over the passage of ERISA, corporate participants including "Old" Monsanto, argued in favor of a uniform body of law to reduce costs for plan sponsors.[3] Surely Respondents as successor entities of "Old" Monsanto are just as eager to resolve a split in the circuits over the availability of equitable relief for breach of fiduciary duty for the protection of "working class" participants' vested pensions against forfeiture. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156, 87 L. Ed. 2d 96, 105 S.

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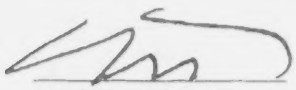
[3]*Missouri v. Monsanto Co., Inc.*, 517 S.W.2d 129 (Mo. 1974).

Ct. 3085 (1985) (Brennan, J., concurring). We believe this Court seems certain to grant merits hearings to address the issues of a conflict of interest as a factor in the employer/administrator setting and the availability of equitable relief to redress the denial of benefits as a result of a breach of fiduciary duty at some point in the very near future. We do not believe former workers of "Old" Monsanto should be compelled to suffer the blow of the "taking" of their property, their "vested" pension benefit, as a result of attrition while other jurisdictions continue to argue the implications of this Court's closely decided cases permitting equitable relief only on a limited basis under ERISA's catchall provision. Rather, Petitioner on behalf of all former workers of "Old" Monsanto believes he should be permitted to participate in what will apparently be the definitive re-argument of these issues.

ERISA was passed by Congress to ensure participants receive promised benefits not as a means to promote forfeiture on a wide scale basis in the interest of corporate executives. 29 U.S.C. § 1001 et seq. Without the relief requested all former workers of "Old" Monsanto who had a separated deferred vested benefit under its defined benefit pension plan may suffer forfeiture of their vested pension benefit contrary to Congresses' stated purpose of establishing ERISA. Accordingly, we believe the Petition for Rehearing is due to be granted.

Accordingly, Petitioner respectfully requests this Court either recall the mandate and remand with instructions in light of intervening precedent or suspend the order denying certiorari and pending a decision by the Eleventh Circuit Court of Appeals in *Heptinstall et al. v. Monsanto Company, Inc.* Appeal No. 9-12665-DD consider Petitioner's Petition for Rehearing. Petitioner's application for a stay under Rule 22 is attached.

Respectfully Submitted,



Mark D. DeBofsky
Counsel of Record
DALEY, DeBOFSKY & BRYANT
55 W. Monroe St., Suite 2440
Chicago, Illinois 60603

Elisa Smith Rives
Of Counsel
Elisa S. Rives LLC
P. O. Box 920
Guntersville, AL 35976

Counsel for Petitioner(s)
Wendell F. Gilley

CERTIFICATION

Counsels for Petitioner(s) certify that the grounds for granting the Petition for Rehearing is restricted to the intervening circumstances and other substantial or controlling grounds not previously presented as setout in the paragraphs above warranting the grant of the Petition for Rehearing, and the Petition is filed in good faith and not for delay. Respondents will not be prejudiced because the only relief available to Petitioner is equitable relief to redress a breach of fiduciary duty.

Respectfully Submitted,

Mark D. DeBofsky
Counsel of Record
DALEY, DeBOFSKY & BRYANT
55 W. Monroe St., Suite 2440
Chicago, Illinois 60603
(312) 372-5200 x 4800
FAX (312) 372-2778

Elisa Smith Rives
Of Counsel
Elisa S. Rives LLC
P. O. Box 920
Guntersville, AL 35976

Counsel for Petitioner(s)
Wendell F. Gilley

Sworn to and subscribed before, _____, this the 15th day of October, 2009

Official Seal
Kathleen M McGuire
Notary Public State of Illinois
My Commission Expires 11/05/2011

NOTARY PUBLIC FOR THE STATE OF ILLINOIS
My Commission Expires: 11/5/11

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s)

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants.

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, judgment is entered in favor of the plaintiff. The court adjudges and declares that the plaintiff is entitled to retirement benefits as provided in the defendants' ERISA Plan. The defendants will pay accrued benefits on past due payments plus appropriate interest and continue to pay retirement benefits as they accrue. The court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment as stated above. Costs are assessed against the defendants. The parties may file suggested amendments to this judgment within ten (10) days.

DONE and **ORDERED** this the **26th** day of January, 2006.

/s/ ROBERT B. ROPST

SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

This cause came on to be heard at trial on the limited issue of whether plaintiff's entitlement to retirement benefits vested before his employment was terminated. In essence the present issue is whether the plaintiff should be credited with 1000 or more hours of vesting service for the year 1972. This court has framed the issues and arguments in its Memorandum Opinion filed on May 31, 2005, and will not repeat those issues and arguments here.[1]

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[1]Since the May 31, 2005 opinion dealt with a motion for summary judgment, it is not entirely relevant to the trial herein addressed. The limited issues of this trial are, however, framed and discussed in that opinion, and, to the extent applicable are adopted here. Some issues addressed in the May 31, 2005 opinion were not tried in the trial now being addressed. See various filings of the parties for further argument and development. While it is doubtful, the respective proposed findings of fact and conclusions of law of the parties may contain some areas of agreement. To the extent they do, they are adopted. The court proposed addressing questions to IRS and/or the Department of Labor. Both sides objected, so the court decided to forego this proposal. The plaintiff's service began on August 30, 1972. Defendant has acknowledged that if that service had begun in late July 1972, plaintiff's retirement benefits would have vested.

While the court has been inundated with verbiage, the task is to determine whether the plaintiff should receive credit for 1000 hours of vesting service for 1972. The issue is close from any perspective.[2]

The court finds and concludes that the defendants' denial of plaintiff's retirement benefits is to be reviewed under a "heightened arbitrary and capricious" standard because of a conflict of interest.

The court further finds and concludes that the defendants' conclusion that plaintiff was not entitled to have overtime considered was arbitrary and capricious and not due to be herein considered. Further, the 95 hour rule is not applicable to a 1972 calculation. In general, later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement.

The court's task is to determine how many hours the plaintiff is entitled to for 1972. Since the defendant does not have adequate records of the plaintiffs overtime hours, the plaintiff should be given some benefit of the doubt in this regard.

---

[2]If plaintiff's testimony that he worked as many overtime hours as regular hours in 1972 is accepted, he would be entitled to 1000 hours of service time. The court has no substantial basis for discrediting this testimony. *See attached* Exhibit A filed by the plaintiff on December 19, 2005.

The plaintiff makes two arguments that this court cannot accept. The first is that overtime hours should be counted as one and one-half hours because the plaintiff would have been paid based on one and one-half hours. The court finds no basis for such a calculation of service time. Second, plaintiff argues that the hours that plaintiff accrued for vacation time, sick pay time, etc. are to be counted at the time accrued rather that at the time taken. The court cannot accept this argument. Without the validity of such arguments, it is questionable as to whether the plaintiff had 1000 actual hours of service in 1972. On the other hand, the defendants' failure to keep adequate records leads to another theory of recovery. 29 C.F.R. § 2530.200b-3(a) states:

> Payroll records, for example, may provide sufficiently accurate data to serve as a basis for determining hours of service. If, however, existing records do not accurately reflect the actual number of hours of service with which an employee is entitled to be credited, a plan must either develop and maintain adequate records or use one of the permitted equivalencies.
>
> . . . .

29 C.F.R. § 2530.200b-3(c) states:

> Use of equivalencies for determining service to be credited to employees.
>
> (1) The equivalencies permitted under paragraphs (d), (e) and (f) of this section are methods of determining service to be credited to employees during computation periods which are alternatives to the general rule for determining hours of service set forth in paragraph (a) of this section. The equivalencies are designed to enable a plan to determine the amount of service to be credited

> to an employee in a computation period on the basis of records which do not accurately reflect the actual number of hours of service required to be credited to the employee under § 2530.200b-2(a). However, the equivalencies may be used even if such records are maintained. Any equivalency used by a plan must set forth in the document under which the plan is maintained.
>
> . . . .

29 C.F.R. § 2530.200b-3(d) states:

> Equivalencies based on working time.
>
> (1) Hours worked. A plan may determine service to be credited to an employee on the basis of hours worked, as defined in paragraph (d)(3)(1) of this section, if 870 hours worked are treated as equivalent to 1,000 hours of service and 435 hours worked are treated as equivalent to 500 hours of service.
>
> (2) Regular time hours. A plan may determine service to be credited to an employee on the basis of regular time hours, as defined in paragraph (d)(3)(ii) of this section, if 750 regular time hours are treated as equivalent to 1,000 hours of service and 375 regular time hours are treated as equivalent to 500 hours of service.

Other parts of 29 C.F.R. § 2530.200b-3 may have application.

The plaintiff makes two arguments of "equivalency" by his attached Exhibits B and C filed by him on December 19, 2005. The court finds and concludes that the plaintiff clearly had at least 870 hours of service (sic) for 1972. On this theory, which the court accepts, the plaintiff's entitlement to

benefits vested prior to this termination. Judgment will be entered in favor of the plaintiff.

This the 26th day of January, 2006. (Exhibits Omitted)

/s/ ROBERT B. PROPST

SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed March 3, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

This cause comes on to be heard on the Defendants' Motion to Amend Judgment of January 26, 2006 filed on February 8, 2006.

The court's intention is to base its partial final judgment solely on a finding and conclusion that the plaintiff is entitled, for reasons stated, to be credited with 1000 hours of service for 1972. Any other claim not previously dismissed will still be pending.

Any issues with regard to the effect of the judgment on other claims can be resolved by further motion practice.

A significant issue with regard to the partial final judgment may be whether the following statement of the defendants, if correct in some instances, has application to a defendant with a conflict of interest. "Although federal regulations recognize a permitted equivalency that uses 870 Hours of Service as the threshold, the regulation is clear that it is for the Plan, and not individual participants, to elect the equivalency of its choice. *See* C.F.R. § 2530.200b-3(a)."

The motion is **DENIED**.[1]

DONE and **ORDERED** this the 3rd day of March, 2006.

/s/ ROBERT B. PROPST

SENIOR UNITED STATES DISTRICT JUDGE

[1]The court recognizes that ERISA was not in effect in 1972. The court's reference to "benefit of the doubt" was not intended as an exact legal standard, but merely to suggest that the defendants were not able to rebut the plaintiff's evidence because it did not retain payroll records.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed June 28, 2007]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s)-Appellant(s),

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants-Appellees,

BEFORE: CARNES, PRYOR, and FARRIS,* Circuit Judges.

CARNES, Circuit Judge:

ORDER

Throughout his judicial career Holmes relished challenging cases. While on Massachusetts' highest court he confessed to a friend that although none of the cases he had handled that year had been of universal interest, "there is always the pleasure of unraveling a difficulty."[4] A decade and a half later, while on the Supreme Court, he told the same friend that he had few cases of general interest that term, but "[t]here is always the fun of untying a knot and trying to do it in good compact form."[5] It is a pity that Holmes did not live to see ERISA cases.

I.

Wendell Gilley was employed by Monsanto Company, Inc. from August 31, 1972 through February 16, 1982 at its Sand Mountain textile plant in

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*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[4]Oliver Wendell Holmes, Jr., *Feb. 23, 1890 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874 – 1932 32, 33 (Mark DeWolfe, ed., Harvard Univ. Press 2d prtg. 1941).

[5]Oliver Wendell Holmes, Jr., *May 25, 1906 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS, *supra* note 1, at 123, 124.

Northeast Alabama. Monsanto closed the plant in March of 1981, but Gilley remained on the payroll in layoff status until February 1982 when he was finally let go. Although the period of his employment was under nine-and-a-half years, Gilley claims that with the overtime that he worked in 1972, he acquired the necessary ten years of "Vested Service" to merit pension benefits.

Under Monsanto's Salaried Employees' Pension Plan, certain employees are entitled to benefits if they are able to meet the vesting requirements of the plan. Although Monsanto has amended its pension plan several times over the years, all relevant versions of the plan set out the same basic vesting requirements: (1) an eligible employee must reach retirement age, and (2) the employee must acquire at least ten years of "Vested Service." An employee earns a year of Vested Service when he completes 1,000 "Hours of Service," defined as all hours of employment for which an employee is directly or indirectly compensated, during that year. The manner in which Hours of Service are calculated has varied as Monsanto has amended its pension plan.

When Gilley began work at Monsanto, the 1971 Plan was in effect. The pension plan was amended in 1976 to comply with the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*,

which went into effect, for our purposes, in 1976.[5] According to Monsanto, both the 1971 Plan and the 1976 post-amendment Plan utilized the "Elapsed Time Method" to calculate Vested Service for pension purposes. Under this method, an employee is credited with the hours that result from dividing the total number of calendar days of employment, including weekends and holidays, by 365 and then multiplying that number by 2,080 (the total hours in a "Standard Work Year" based on a forty-hour work week). In other words, an employee's Hours of Service are determined based on the fraction of the year he is employed, multiplied by the Standard Work Year—if an individual is employed for 176 days out of the year, he would be entitled to 1,002 Hours of Service or one year of Vested Service.

Sometime between 1979 and 1981, the Plan Committee decided to change the way Hours of Service are determined, adopting the "95-Hour Rule" and incorporating it into the amendments to the 1981 Plan. Under this calculation method, the provider credits all employees with ninety-five Hours of Service for each two-week period they are employed, regardless of the

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[5]The majority of ERISA became effective January 1, 1975, but for all pension plans in existence as of January 1, 1974, of which the Plan here was one, the participation and vesting standards of ERISA became applicable on the first day of the plan year beginning after December 31, 1975, effectively 1976. *See* 29 U.S.C. § 1061(b)(2).

actual hours worked. The 95-Hour Rule expressly excludes additional credit for overtime hours, embodying the assumption that the fifteen extra Hours of Service credited on a biweekly basis (assuming a 40-hour week or 80 hours every two weeks) is a fair way to cover any overtime hours worked. In addition to adopting the 95-Hour Rule, the 1981 Plan stated that an employee's benefit rights are to be determined according to the pension plan in effect at the time that the employee separates from Monsanto.

Believing that he had acquired ten years of Vested Service, even though he had only worked for Monsanto for nine full years and part of two other years (1972 and 1982), Gilley applied for pension benefits in 2001. Monsanto denied his request, because it concluded that Gilley's Vested Service fell short of the requisite ten years. Gilley filed an administrative appeal, and the Monsanto Plan Committee denied his petition. It applied the 1981 Plan and the 95-Hour Rule to determine that Gilley was only entitled to 9.594 years of Vested Service.

Gilley filed suit claiming that Monsanto had: (1) arbitrarily and capriciously denied his claim for benefits, in violation of ERISA § 502, 29 U.S.C. § 1132; (2) made oral and written assurances that all employees hired at the Sand Mountain plant after September 1972 were vested and, therefore,

is equitably estopped from denying Gilley benefits now under ERISA § 502; (3) intentionally closed the Sand Mountain Plant right before the employees would reach the ten year mark, in violation of ERISA § 510, 29 U.S.C. § 1140; (4) amended the Plan to retroactively reduce or eliminate the amount of accrued Hours of Service in violation of ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1); and (5) breached its fiduciary duty by failing to act in the best interest of plan participants, in violation of ERISA § 404, 29 U.S.C. § 1104. Monsanto filed a motion to dismiss, arguing that the 1981 Plan governed the determination of Gilley's credit, and that under the plan Gilley lacked the requisite ten years of Vested Service. The district court denied the motion to dismiss.

Gilley then filed an amended complaint, specifically restating all of his claims under the "equitable relief" section of ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3), and adding a claim under § 502(c), 29 U.S.C. § 1132(c), and § 510, 29 U.S.C. § 1140, asserting that Monsanto had interfered with his attempts to attain benefits by refusing to provide him with requested documents. The amended complaint alleged that the 95-Hour Rule should not be applied because, according to Gilley, it is less favorable to him than the 1976 Plan's method of calculating Hours of Service.

Monsanto filed a motion for summary judgment, asserting that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), only permits equitable relief and does not apply when a party is seeking purely legal relief, as Monsanto claimed Gilley was doing.[7] Additionally, Monsanto restated its argument that Gilley cannot prove the ten years of Vesting Service necessary to merit benefits. It put before the court Social Security records indicating that Gilley had earned a total of $2,149.68 in 1972, and other records showing that in 1972 his base salary had been $420 monthly, or $5,040 annually. Gilley argued that the $420 figure actually included overtime pay and that his monthly base salary was really only $390, which would have been $4,680 annually.

Based on all of those records, Monsanto argued that even if the district court calculated Hours of Service based on the actual hours Gilley worked,

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[7]Monsanto contends that Gilley cannot properly make out an equitable claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because he is actually seeking legal relief which can only be granted under § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(b). Our disposition of this appeal does not require us to decide the nature of the relief Gilley is seeking, and it is not a question that goes to the existence of subject matter jurisdiction. *See Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (noting that subject matter jurisdiction exists even if the remedy sought under § 502(a)(3) is legal in nature, because a finding that the relief sought is legal in nature "'does not negate the existence of federal subject matter jurisdiction, but rather indicates that [the plaintiff] may have failed to state' a claim upon which relief can be granted" (quoting *Health Cost Controls v. Skinner*, 44 F.3d 535, 537–38 (7th Cir. 1995)).

Gilley still was not entitled to a pension. Using the $2,149.68 figure, a $420 monthly base salary, and the 2,080 hour "Standard Work Year" set out in the 1981 Plan, Monsanto asserted that Gilley could have actually worked only 887.2 hours in 1972 (if all hours were compensated equally), well short of the 1,000 hours needed. Monsanto also pointed out that because the $2,149.68 salary Gilley earned in 1972 included compensation for some overtime and holiday hours, which would have been paid at a premium rate, Gilley's actual hours worked would be much less. What's more, even if Gilley's claimed $390 monthly salary figure and the resulting $4,680 annual salary figure are accepted, the maximum it appears Gilley could have worked in 1973 based on the Social Security records is 955.41 hours (assuming all hours were compensated at the same hourly wage). Still, the district court denied Monsanto's motion, finding that a trial was warranted based on the "closeness of the vesting issue."

A two-day bench trial was conducted solely to decide the number of Hours of Service credit Gilley was entitled to receive for his employment in 1972. After trial, the district court ordered Gilley to submit an "itemized, succinct list showing exactly how [he] . . . would arrive at a minimum of 1,000 [H]ours of [S]ervice in 1972." In response, Gilley offered three "equivalencies,"

claiming that each showed he was entitled to benefits. ERISA gives a plan the option of using equivalencies in order to simplify the record keeping and calculation burdens associated with determining Hours of Service. 29 C.F.R. § 2530.200b-3(a). A list of equivalencies from which a plan may choose is contained in the regulation, id. § 2530.200b-3(d), (e).

The district court accepted two of the three equivalencies that Gilley suggested. One of those two calculates Hours of Service based on "Hours Worked" under 29 C.F.R. § 2530.200b–3(d)(1), granting 1,000 Hours of Service if 870 hours are worked. The other calculates Hours of Service based on "Regular Time Hours" under 29 C.F.R. § 2530.200b–3(d)(2), granting 1,000 Hours of Service if 750 "Regular Time Hours" are worked. The parties dispute whether Gilley would be entitled to a pension under either or both of the two equivalencies the district court adopted. The math involved with both equivalencies is dense, enough so that during oral argument counsel had difficulty answering some of our questions about the numbers and formulas used during the trial.

The more fundamental point that Monsanto stressed, however, is that the Plan never included either of the two equivalencies that the district court used at Gilley's urging. Instead, the 1981 Plan included the 95-Hour Rule.

another equivalency permitted by ERISA. *See* 29 C.F.R. § 2530.200b-3(e)(1)(iii). We will spare the reader the details of how the 95-Hour Rule plays out in Gilley's circumstances, except to say that everyone agrees that under it Gilley would not be entitled to a pension.

In its findings of fact and conclusions of law, the district court refused to apply the 95-Hour Rule set out in the 1981 Plan. Its reasoning was that "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement." Even though the two equivalencies that were more favorable to Gilley had never been part of the Plan, the district court justified their use on the grounds that Monsanto had not kept adequate records of the hours Gilley worked in 1972. It said that Gilley was entitled to the "benefit of the doubt" because Monsanto had failed to keep adequate records from that year. Applying the two equivalencies that Gilley preferred, the court determined that he did have the requisite Hours of Service to receive a full year of credit for 1972, giving him ten years of Vested Service which entitled him to a pension. Throughout its reasoning, the court applied a "heightened arbitrary and capricious" standard of deference, because it concluded that the Plan Committee had a conflict of interest in making benefit decisions.

The court's judgment ordered Monsanto to pay Gilley his past due pension benefits, "plus appropriate interest," and to pay additional retirement benefits as they accrue in the future. Monsanto filed a motion to alter or amend the district court's judgment, asserting multiple mathematical and legal errors in the application of the two equivalencies the district court used. After the court denied that motion, Monsanto filed this appeal.

II.

We initially had some doubt about our jurisdiction to decide this appeal because, while the district court ordered Monsanto to pay "appropriate interest" on the award of past benefits, it did not specify the rate of interest or the date from which the interest would be calculated. We were concerned that the judgment might not be final under 28 U.S.C. § 1291 for purposes of appellate review.

The district court's failure to set an interest rate for calculating prejudgment interest might have been a problem for the purpose of our jurisdiction if the judgment had no injunctive aspects. *See SEC v. Carrillo*, 325 F.3d 1268, 1272–73 (11th Cir. 2003) (per curiam) (noting that "if the judgment amount, the prejudgment interest rate, or the date from which prejudgment interest accrues is unclear, the calculation of prejudgment

interest is no longer a ministerial act and the court's order is not final"); *but see Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89–90 (11th Cir. 1989) (addressing the merits but remanding the case back to the district court for clarification on the questions of whether prejudgment interest was intended and the rate at which any such interest should be calculated). However, the judgment here does include injunctive relief, because it requires Monsanto to continue to pay pension benefits as they accrue in the future. Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over orders granting injunctive relief. The district court's judgment here is injunctive enough in nature to give us jurisdiction over the appeal.

III.

On the merits, both sides agree that Gilley must have ten years of credit to be entitled to a pension, and they agree that he earned at least nine years of credit for his work at the plant from 1973 to 1982. Their disagreement is about whether Gilley gets a full year of credit for 1972, his first year on the job, when he actually worked only four months for Monsanto. If Gilley is credited with a full year for working those four months, he gets a pension.

The district court's conclusion that Gilley should be treated as having worked a full year in 1972 was based on its belief that instead of the 95-Hour

Rule in the 1981 Plan, the Hours Worked or Regular Time Hours equivalencies, which Gilley proposed, should be used. The parties disagree about whether Gilley is entitled to a pension even if those two equivalencies are used, but they do agree that he is not entitled to a pension under the 1981 Plan's 95-Hour Rule. The question that determines the issues we address in this appeal is whether the 95-Hour Rule is the equivalency that should be applied.

A.

The parties think that the answer to that question might depend on the standard of deference applicable to the Plan Committee's decision to deny Gilley pension benefits. Monsanto argues that the arbitrary and capricious standard applies, while Gilley thinks the district court was correct to apply a heightened arbitrary and capricious standard. Given the nature of the issue on which this case turns, we doubt that the standard of deference makes any difference. To the extent that it does, however, the proper standard is arbitrary and capricious.

ERISA does not explicitly establish the standard of review to be applied to a plan administrator's decision. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S. Ct. 948, 953 (1989). Following the Supreme Court's

direction, however, we have adopted three different standards to guide us: (1) *de novo* review applies where the plan administrator has been given no discretion in deciding claims; (2) arbitrary and capricious review applies where the plan administrator has discretion in deciding claims and does not suffer from a conflict of interest; and (3) heightened arbitrary and capricious review applies where the plan administrator has discretion but suffers from a conflict of interest. *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir. 2001). For purposes of that third standard, a conflict of interest exists when a provider has to pay benefit claims out of its own assets, making it directly advantageous to the provider for the claims to be denied. These three standards have been broadly applied to both the administrator's interpretation of plan provisions as well as the administrator's decision to grant or deny benefits. *Williams v. Bellsouth Telecomms., Inc.*, 373 F.3d 1132, 1135 n.3 (11th Cir. 2004); *Paramore v. Delta Air Lines, Inc.*, 129 F.3d 1446, 1451 (11th Cir. 1997).

Our circuit law is clear that no conflict of interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits. *See Buckley v. Metro. Life*, 115 F.3d 936, 939–40 (11th Cir. 1997). Only when

benefits are paid from a provider's assets, so that benefit decisions have a direct and immediate impact on the provider's profit margin, does the heightened standard come into play. *See Williams*, 373 F.3d at 1135.

In this case, the Plan gave the Plan Committee discretion to make benefits decisions. The record clearly establishes that benefits were paid out of a nonreversionary trust instead of from Monsanto's own assets. In *Buckley*, we specifically considered the standard of deference to be applied when benefits are paid out of a trust funded by periodic, non-reversionary contributions. 115 F.3d at 939. We held that where the company neither incurs a direct expense in paying benefits nor directly profits from denying or discontinuing benefits, there is no conflict of interest. *Id.* at 939–40. That holding has been reiterated in subsequent cases. *See, e.g., Turner v. Delta Family-Care Disability & Survivorship Plan*, 291 F.3d 1270, 1273 (11th Cir. 2002) (per curiam) (a non-reversionary, periodic trust "eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies"). The fact that the company is responsible for replenishing the funds of the trust is not enough to create a conflict of interest. *Id.*

For these reasons, the district court erred in applying the heightened arbitrary and capricious standard. To the extent that a deference standard applies, the ordinary arbitrary and capricious standard is the one.

B.

The district court also erred in forcing on the Plan two equivalencies that the Plan had never adopted. The court based its substitution of the equivalencies, Gilley favored for the one in the Plan on its view that Monsanto had failed to keep adequate records of the hours Gilley worked in 1972. We have some doubts about whether a court generally can impose on a plan equivalencies that the plan did not choose simply because of the absence of adequate records.

We have no doubt, however, that a plan cannot be forced to use an equivalency that is different from the one the plan chose simply because it or the company did not keep adequate records for ERISA purposes before there was any ERISA. The year we are talking about is 1972, and ERISA was not enacted until September of 1974 (with an effective date, for our purposes, of January 1, 1976, *see* 29 U.S.C. § 1061(b)(2)). Only after the time for doing so had passed did the Plan and the company learn that it would be necessary to

make and keep the records. Companies and pension plan managers are not required to be clairvoyant.

Instead, when it comes to pre-enactment years, ERISA requires only that plans do the best they can with the records they have, and it permits plans to choose an equivalency from those set out in the regulations. 29 C.F.R. § 2530.200b-3(b), (d), (e). This is how the relevant regulation reads:

> If accessible records are insufficient to make an approximation of the number of pre-effective date hours of service for a particular employee . . . the plan may make a reasonable estimate of the hours of service completed by such employee . . . . A plan may use any of the equivalencies permitted under this section, or the elapsed time method of crediting service . . . to determine hours of service completed . . . .

Id. § 2530.200b–3(b).

That is exactly what the Plan did in this case. It chose the 95-Hour Rule and applied the rule to the vagaries of Gilley's 1972 work history. As the regulation we have quoted shows, ERISA permitted it to do so. The statute and regulations leave the choice of equivalencies to plans, not to courts. The district court should not have overridden the Plan's choice and applied an equivalency that was not in the Plan. *See id.* § 2530.200b-3(c)(1) ("Any equivalency used by a plan must be set forth *in the document* under which the plan is maintained." (emphasis added)).

C.

In addition to substituting its own preferred equivalencies because of the lack of adequate records of Gilley's work hours in 1972, the district court also rejected the 95-Hour Rule because it was adopted after 1972. The record is unclear exactly when the 95-Hour Rule was adopted, but it was sometime between 1979 and January 1, 1981. The district court thought the fact that the rule was not adopted until sometime during that period foreclosed its use because, in the court's words, "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement."

First, it is important to recognize that there is no way Gilley could have accumulated the requisite ten years of Vested Service, under any calculation method, by the time Monsanto adopted the 95-Hour rule. On January 1, 1981, Gilley could have accumulated, at most, nine years of Vested Service credit. Even if he is given a full year of credit for 1972, he would still only have acquired nine years by the beginning of 1981. All of Gilley's arguments that he earned ten years of Vested Service count hours he worked in 1981 after the Plan was amended to put the 95-Hour Rule in place. This fact is

critical to our analysis of whether the adoption of the 95-Hour Rule and its application to Gilley violated ERISA.

Gilley takes the district court's determination that later amendments cannot adversely impact a plaintiff's entitlement and runs with it, casting it in terms of ERISA's "anti-cutback" rule. ERISA § 204(g), 29 U.S.C. § 1054(g)(1). One of the purposes of ERISA is to protect pension rights by ensuring "that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375, 100 S. Ct. 1723, 1733 (1980). To further that purpose, the "anti-cutback" rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g), 29 U.S.C. § 1054(g)(1). By its own terms, what the rule forbids is cutbacks on "accrued benefits." There is a difference between "accrued benefits" and "vested benefits."

The Supreme Court has explained that benefit accrual is "the rate at which an employee earns benefits to put in his pension account," while benefit vesting refers to the point at which a participant's pension rights become nonforfeitable "by virtue of his having fulfilled age and length of

service requirements." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749, 124 S. Ct. 2230, 2238 (2004). A participant is fully vested when he has a nonforfeitable right to his total accrued benefit. In other words, benefit accrual affects the size of the pension, while benefit vesting determines whether a pension will be paid at all. *See Stewart v. Nat'l Shopmen Pension Fund*, 730 F.2d 1552, 1561–62 (D.C. Cir. 1984)(noting that "'vesting' governs when an employee has a right to a pension; 'accrued benefit' is used in calculating the amount of the benefit to which the employee is entitled"); *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 359 (7th Cir. 2006) ("Benefit accrual and vesting are related but different concepts. 'Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable.'" (quoting *Hoover v. Cumberland, Md., Area Teamsters Pension Fund*, 756 F.2d 977, 983–84 (3d Cir. 1985)).

The Plan amendment adopting the 95-Hour Rule affected Gilley's ability to vest before he had vested, but it did not reduce the amount of his accrued benefit or the rate at which he was accruing benefits. Throughout Gilley's employment the Plan provided that an employee had to reach the retirement age and have accumulated the requisite ten years of Vested Service before he

was entitled to a pension. The amendment adopting the 95-Hour Rule, which occurred during Gilley's employment, did not affect the rate at which he accrued benefits, although it did alter the method for calculating Vested Service, which in turn determined whether he received a pension. The ERISA § 204(g) anti-cutback provision does not apply to changes in vesting requirements.

There is another provision, however, that does. Section 203 of ERISA provides that a plan amendment changing the vesting schedule shall be treated as not satisfying the requirements of ERISA:

> if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment, unless the employee is given the option of electing the pre-amendment plan.

ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). Although Monsanto argues that the amendment introducing the 95-Hour Rule did not change the vesting schedule, some courts have concluded that changes in the way vesting is determined can amount to an alteration of the vesting schedule. *See, e.g., Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982) (noting that the cancellation of past service credits, which

diminished the pension credits of otherwise vested participants, was a vesting schedule amendment). We will assume for present purposes that those courts are correct and that the Plan amendment we are discussing did change the Plan's vesting schedule.

Even making that assumption, there still was no violation of ERISA § 203, because the plain language of the provision limits its scope to benefits that are nonforfeitable ("if the nonforfeitable percentage . . . such nonforfeitable percentage") at the time the amendment is adopted or becomes effective ("determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective"). ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). When the 95-Hour Rule amendment became effective on or before January 1, 1981, and when it was adopted sometime on or before that date, Gilley was not entitled to any benefits, because he could not have earned ten years of Vested Service until after that date. Because Gilley was not vested at the time the amendment was adopted or became effective, ERISA § 203 does not help him. It follows that the district court erred in concluding that the Plan amendment adopting the 95-Hour Rule could not be applied to Gilley because it came after he had started earning credit toward his pension.

D.

To the district court's reasons for not allowing the 95-Hour Rule, Gilley adds some more of his own. Among them is his assertion that he was never properly notified of the amendment. We decline to consider that contention because it was raised for the first time in this appeal. *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993) ("By well settled convention, appellate courts generally will not consider an issue or theory that was not raised in the district court."). Gilley also appears to argue that the amendment discriminates against him, an argument which is difficult to follow and unpersuasive in any event.

Finally, Gilley raises a host of arguments, both before us now and in earlier proceedings, about why he is equitably entitled to a pension notwithstanding his inability to satisfy the vesting requirements under the 95-Hour Rule. The district court did not reach any of these arguments and we decline to take the first swing at them. Some may require factual development, while all of them may benefit from two-tier consideration. All of them the district court should deal with as it deems appropriate on remand.

IV.

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

/s/ Edward S. Carnes

EDWARD CARNES
CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. 04-0562

[Filed June 12, 2008]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s),

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants.

BEFORE: C. Lynwood Smith, UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

Plaintiff was ordered to show cause why this action should not be dismissed for lack of jurisdiction based on the opinions of the Eleventh Circuit in *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11th Cir. 2007), holding that plaintiff did not vest under the terms of his employer's pension plan *prior* to the termination of his employment, and the former Fifth Circuit in *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980)(holding that "a former employee whose pension benefits were not vested at the time of [his] termination . . . is not a 'participant' [under ERISA]."[1] *See also Jackson v. Sears, Roebuck and Co.*, 648 F.2d 225, 228-29 (5th Cir. 1981) (agreeing with *Nugent*).

Plaintiff responded to the show cause order with a number of arguments that can be distilled into two distinct themes: (1) *Nugent* is no longer an accurate statement of Eleventh Circuit law in light of the Supreme Court's holding in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and Eleventh Circuit decisions handed down subsequent to *Firestone*; and (2) the *Gilley* decision should not be followed by this court under exceptions to the law of the case doctrine. Neither of these positions has merit, and this action

is due to be dismissed because of plaintiff's lack of standing to pursue ERISA claims.

As noted by this court in its May 21, 2008 show cause order,

> "[t]he only parties that have standing to sue under ERISA are those listed in the civil enforcement provision of ERISA, codified at 29 U.S.C. § 1132(a)." *Hobbs* [*v. Blue Cross Blue Shield of Alabama*], 276 F.3d [1236,] at 1240 [(11th Cir. 2001)] (citing *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir. 1997) (same)). An action seeking relief under ERISA can only be brought by a participant," a "beneficiary," or a "fiduciary" of an ERISA plan; or, in certain instances, by the Secretary of the United States Department of Labor. *See* 29 U.S.C. § 1132(a).[1]

Plaintiff insists that, by virtue of the Supreme Court's holding of *Firestone*, he is a "participant" under the relevant ERISA plan based on his allegations in this lawsuit, and that, as such, he has standing to sue under ERISA. ERISA defines a "participant" as:

> any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit* of any type *from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis supplied).

Plaintiff argues that the Supreme Court's holding in *Firestone* is inconsistent with and, thus, overturns the former Fifth Circuit's prior holding

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[1] Doc. no. 189 (show cause order) at 5-6.

in *Nugent* — a case indicating that plaintiff is not a "participant." This court finds that there is no inconsistency between *Firestone* and *Nugent*. *Firestone* provides the definitive analysis of the "may become eligible to receive a benefit" language in 29 U.S.C. § 1002(7), and held that a former employee is a "participant" only if he or she has a reasonable expectation of returning to covered employment, or has a colorable claim that he or she will fulfill eligibility requirements in the future. *See* 489 U.S. at 117-18 ("In order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."). Here, plaintiff does not meet either criterion.

Specifically, plaintiff argues that he has a colorable claim for benefits by virtue of his allegations that he is a "participant" of the Monsanto Company Salaried Employees' Pension Plan.[2] Stated differently, plaintiff asserts that he is a "participant" because he claims it to be so. His argument, however, runs contrary to key components of the *Firestone* decision. In *Firestone*, the Supreme Court specifically rejected the notion that 29 U.S.C. § 1132 "should

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[2] *Nota bene*: Plaintiff does not, and indeed cannot under the facts of this case, argue that he has a reasonable expectation of returning to covered employment.

be read to mean that a civil action may be brought by someone who *claims to be a participant*," and found that such an "interpretation of the term 'participant' . . . strays far from the statutory language." *Firestone*, 489 U.S. at 117 (emphasis supplied). "To say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous." *Id.*

> In our view, the term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2nd Cir. 1985), or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to *vested* benefits. *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) [(*abrogated by Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995)].

Id. (emphasis supplied).

Further, *Firestone* makes it clear that a former employee who does not have "a colorable claim to *vested* benefits . . . simply does not fit within the [phrase] 'may become eligible.'" *Firestone*, 489 U.S. at 118 (quoting *Saladino*, 754 F.2d at 476) (brackets in original) (emphasis supplied).[3] The holding in

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[3] Justice Scalia, in his concurring opinion in *Firestone*, noted that

> the phrase "may become eligible" has nothing to do with the probabilities of winning a suit. I think that, properly read, the definition of "participant" embraces those whose benefits have

Firestone, therefore, does not appear to be inconsistent with *Nugent*, which provides that a plaintiff who did not vest under the terms of an ERISA benefits plan prior to the termination of his or her employment is not a "participant" under ERISA. *See Nugent*, 625 F.2d at 1287.

Further, contrary to plaintiff's position, *Nugent* has not been overruled by either the United States Supreme Court or the Eleventh Circuit, and it remains authority binding upon this court. Plaintiff directs this court to *Smith v. Wynfield Development Co., Inc.*, 238 Fed. Appx. 451 (11th Cir. 2007),[4] and *Lyons v. GeorgiaPacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1240 n.8 (11th Cir. 2000), as the basis for his argument that "standing in the Eleventh Circuit is no longer dictated" by *Nugent*.[5] Plaintiff's reliance on *Smith* and *Lyons* is wholly misplaced, however, because

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> vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future, but not those who have a good argument that benefits have vested even though they have not.

489 U.S. at 119 (Scalia, J. concurring).

[4]"Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. *Smith v. Wynfield Development Co., Inc.* was designated by the Eleventh Circuit as an unpublished opinion. *See* 238 Fed. Appx. at 451.

[5]Doc. no. 91 (plaintiff's response to May 21, 2008 show cause order) at 7-8.

neither *Smith* nor *Lyons* addresses the issue that was before the former Fifth Circuit in *Nugent*, nor provides any discussion or mention of *Nugent*.

In *Smith*, the Eleventh Circuit addressed the question of whether a district court had subject matter jurisdiction because of ERISA preemption over a lawsuit in which only state law claims were asserted. *See* 283 Fed. Appx. at 454-58. In reaching its conclusion on the jurisdictional question, the Court determined, on the basis of the following rationale, that the appellant was a "participant" under the terms of an ERISA health insurance plan:

> Smith has standing to sue as a "participant" of the health insurance plan. . . . Here, Smith alleged that she was eligible to receive group health insurance benefits based on her employment, but that she was denied those benefits because of Defendants' failure to enroll her properly. If Smith's allegations are true, she may become eligible to receive the benefits of the group health plan to which she was otherwise entitled. Thus, based on her allegations, we conclude that Smith is a "participant" in the relevant ERISA plan, even though she was never properly enrolled in the plan. Smith cannot avoid ERISA preemption simply by stating that she was never properly enrolled in the plan, when the failure to enroll her properly is the very fact that gives rise to her cause of action.

Smith, 283 Fed. Appx. at 457. Plaintiff does not develop his argument that *Smith* overturns *Nugent*, and this court will not give consideration to arguments that are not fully developed or bolstered with legal authority. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) (refusing

to address a party's "perfunctory and underdeveloped argument"). Nevertheless, this court finds that the issue before the Eleventh Circuit in *Smith* has nothing whatsoever to do with the holding in *Nugent*, and that *Smith* cannot be read to abrogate *Nugent*.[6]

Further, unlike plaintiff in the present case, the plaintiff in *Lyons* was vested under the terms of the relevant ERISA plan prior to the termination of his employment. *See Lyons*, 221 F.3d at 1239 ("On January 5, 1991, Lyons left employment at Georgia-Pacific. In accordance with Article 4 of the Plan, Lyons was entitled to a vested benefit, because he had worked for Georgia-Pacific and Great Northern for at least five years."). For that reason, *Lyons* is distinguishable from *Nugent*, and cannot be construed as overruling *Nugent*.

Insofar as plaintiff invites this court to depart from the Eleventh Circuit's holding in *Gilley*, this court declines to do so. Plaintiff argues that there are certain scenarios that might appropriately give a district court cause to deviate from the law of the case doctrine;[7] however, the cases cited by

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[6]This is especially true in view of the well-settled rule quoted in note 6 *supra*.

[7]The doctrine of the law of the case mandates that "an appellate court decision on an issue . . . be followed in all subsequent trial court proceedings in the same case." *United States v. White*, 846 F.2d 678, 684 (11th Cir. 1988). "The purpose of the law of the case doctrine is to bring an end to litigation. In addition, it ensures that district courts obey appellate courts and that the

plaintiff in support of this proposition involve situations where the *Eleventh Circuit*, *not* a district court, set aside the law of the case doctrine and revisited a prior Eleventh Circuit holding on an issue of law or fact in a particular case. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005) (conceding that there are certain circumstances whereby an appellate court may stray from the law of the case doctrine); *Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (same); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1139-40 (11th Cir. 1984) (same, and noting that the law of the case doctrine is an "amorphous concept"). Contrary to plaintiff's argument, it is well-settled that, "[o]n remand a district court is not free to deviate from the appellate court's mandate." *Wheeler*, 746 F.2d at 1140 n.2. Such is the case here, and this court will not revisit those matters that were decided by the Eleventh Circuit in *Gilley*. With regard to the present case, the Eleventh Circuit held in *Gilley* that plaintiff did not vest under his employer's applicable benefits plan prior to the termination of his employment. *See* 490 F.3d at 858-60. Accordingly, plaintiff is not a "participant," and he lacks standing to sue under ERISA.

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parties are not required to relitigate settled issues." *Id.* at 684-85 (citing *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1984)).

Consistent with the May 21, 2008 show cause order and for the reasons discussed herein this case is due to be, and hereby is **DISMISSED** without prejudice due to this court's lack of subject matter jurisdiction.[8] In addition, because this court does not have subject matter jurisdiction over this action, it lacks the power to rule on the parties' pending motions. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (noting that when a court lacks subject matter jurisdiction it "cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit."). As such, the clerk is directed to administratively terminate all pending motions, and to close this file. Costs are taxed as paid.

DONE this 12th day of June, 2008.

/s/ LYNWOOD SMITH
UNITED STATES DISTRICT JUDGE

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[8]Defendants assert that, although they agree that plaintiff lacks standing to pursue ERISA claims, this court should table the issue of standing, and should reach a determination as to the merits of plaintiff's remaining claims. Because standing is a jurisdictional issue, and plaintiff does not have standing to sue under ERISA, this court lacks the power to make the sort of substantive ruling sought by defendants. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (mentioning that when a federal court lacks jurisdiction over a controversy, the court cannot take any action other than dismissing the case); *Bischoff v. Osceola County, Florida*, 222 F.3d 874, 877-878 (11th Cir. 2000) (noting that a plaintiff's standing to bring an action is a jurisdictional issue).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed February 3, 2009]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees.	)

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

ORDER

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We conclude that plaintiff cannot circumvent the law of the case established in *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11thCir. 2007). Therefore, plaintiff's claims in Count I and V are foreclosed. With respect to his claim based upon new evidence, we conclude that the evidence is not new, and that plaintiff had ample opportunity to present that evidence in the hearing before the district court prior to the first appeal. Nor is there any other meritorious exception to the law of the case. With respect to plaintiff's claims in Counts II, III and IV, plaintiff's initial brief on appeal failed to preserve the claims, and in any event the claims are without merit.

AFFIRMED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed April 6, 2009]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees,	)

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13646-EE

[Filed April 28, 2009]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff(s)-Appellant(s),	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation	)
Defendants-Appellees,	)

ORDER:

(X) The motion of Appellant, Wendell F. Gilley, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant, Wendell F. Gilley, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 5, 2009, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF COMPLIANCE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

As required by Supreme Court Rule 39 and 33.2. I certify that the Petition for Rehearing filed herewith is in compliance with Rule 33.2 in that it contains less than forty (15) pages, excluding the parts of the petition exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 30th Day of October, 2009.

Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 30, 2009

Notary Public State of Alabama
My Commission expires: October 25, 2011

CERTIFICATE OF SERVICE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

I, Elisa Smith Rives, hereby certify that one original and ten (10) copies of the Petition for Rehearing originally received by the Court on October 20, 2009, was resent via UPS 3-day service to the U.S. Supreme Court on October 30, 2009, with a revised Affidavit per the Clerk's direction. One copy of the revised Affidavit was sent by United States Mail to the following parties listed below, this the 30th day of October, 2009:

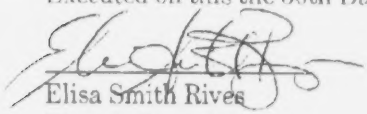
Mr. Jeffrey S. Russell, Esq.
Bryan Cave, LLP
211 N. Broadway, Ste 3600
St. Louis, MO 63102-2750
(314) 259-2725

Thomas K. Kahn, Clerk United States Mail
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303
Attn: Civil Appeal No. 08-13646-EE

All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is:

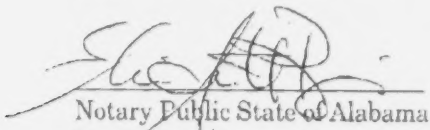
Executed on this the 30th Day of October, 2009.



Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 30, 2009



Notary Public State of Alabama
My Commission expires: October 25, 2011

CERTIFICATE OF SERVICE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

I, Elisa Smith Rives, hereby certify that one original and ten (10) copies of the foregoing Petition for Rehearing and Motion to Recall Mandate, were sent via 3-day service to the U.S. Supreme Court, and 1 copy to the following parties listed below, this the 17th day of October, 2009:

Mr. Jeffrey S. Russell, Esq. (3-DAY)
Bryan Cave, LLP
211 N. Broadway, Ste 3600
St. Louis, MO 63102-2750
(314) 259-2725

David W. Gearhart (GROUND)
500 North Broadway
Suite 2000
St. Louis, MO 63102-2147
(314) 444.1394

Mr. Mark D. DeBofsky (GROUND)
Daley, DeBofsky & Bryant
55 W. Monroe St., Ste 2440
Chicago, Illinois 60603
(312) 372-2778

Thomas K. Kahn, Clerk (3-DAY)
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303
Attn: Civil Appeal No. 08-13646-EE

All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is:

Executed on this the 17th Day of October, 2009.

Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 17, 2009

Notary Public State of Alabama
My Commission expires: October 25, 2011

CERTIFICATE OF COMPLIANCE
No. 08-1511

WENDELL F. GILLEY,
an individual and as class representative et al.,
Petitioner(s)

v.

MONSANTO COMPANY, INC.,
a corporation et al.
Respondents.

As required by Supreme Court Rule 39 and 33.2. I certify that the Petition for Rehearing and Motion to Recall the Mandate filed herewith are in compliance with Rule 33.2 in that they contain less than forty (15) pages, excluding the parts of the petition and motion that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 17th Day of October, 2009.

Elisa Smith Rives
Elisa S. Rives LLC
P.O. Box 920
Guntersville, AL 35976
(256) 582-3559

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: October 17, 2009

Notary Public State of Alabama
My Commission expires: October 25, 2011